

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Altus A. BRANCH 46537

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2479

Altus A. BRANCH

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By order dated 8 February 1988, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's Merchant Mariner's License for three months remitted on conditions of probation for twelve months. This order was issued upon finding proved a charge of negligence supported by a single specification. The specification found proved that Appellant, while serving as a towboat operator aboard the M/V BILL FROREICH, under the authority of the captioned license, did, on or about 5 October 1987, negligently navigate said vessel by failing to arrange a proper meeting situation with the M/V JANET DICHARRY, thereby contributing to a collision in the vicinity of mile marker 179 n the Gulf Intracoastal Waterway.

The hearing was held at New Orleans, Louisiana on 20 January 1988. Appellant appeared at the hearing with counsel, and entered, in accordance with 46 CFR SS5.527(a), an answer of deny to the charge of negligence and the supporting specification.

The Investigating Officer introduced in evidence five exhibits and called three witnesses.

Following the conclusion of the Coast Guard's case, Appellant moved to dismiss the charge and specification for failure of proof. The Administrative Law Judge took the motion under advisement, and Appellant elected not to present any evidence or call any witnesses in his own behalf.

After the hearing the Administrative Law Judge rendered a

decision in which he concluded that the charge and specification had been found proved, and entered a written order suspending all licenses and/or documents issued to Appellant as specified above.

The complete Decision and Order was dated 8 February 1988 and was served on Appellant by certified mail on 8 February 1988. Notice of Appeal was timely filed and the appeal considered perfected on 8 April 1988.

FINDINGS OF FACT

Appellant is the holder of Coast Guard Merchant Mariner's License No. 46537. Appellant's license authorizes him to serve as operator of uninspected towing vessels upon inland waters of the United States. Appellant is also the holder of Merchant Mariner's Document No. 437 48 0985, which authorizes him to act as a tankerman.

The M/V BILL FROREICH, 214.25 gross tons, O. N. 570081, is an uninspected towing vessel 80 feet in length. At about 0545 on 5 October 1987, the M/V BILL FROREICH, pushing three barges, was proceeding in an easterly direction in the Gulf Intracoastal Waterway in the vicinity of mile number 179 on a voyage from Texas City, Texas, to Old River, mile number 302.

The M/V JANET DICHARRY, 105 gross tons, O. N. 618226, is an uninspected towing vessel 56 feet in length. At about 0545 on 5 October 1987, the M/V JANET DICHARRY, pushing three barges, was proceeding in a westerly direction in the Gulf Intracoastal Waterway in the vicinity of mile number 179 on a voyage from Pascagoula, Mississippi, to Houston, Texas.

On the morning of 5 October 1987, Operator Charles R. Pritchett was standing the midnight to 0600 watch on the M/V BILL FROREICH. At the same time, Operator Robert Earl Guidry was standing the midnight to 0600 watch on the M/V JANET DICHARRY.

At about 0510 on 5 October 1987, Operator Pritchett on the M/V BILL FROREICH, which was at approximately mile 180.5 of the Gulf Intracoastal Waterway, contacted the M/V JANET DICHARRY by radio. A one whistle port to port passing was agreed to by Operator Pritchett on the M/V BILL FROREICH and Operator Guidry on the M/V JANET DICHARRY.

At about 0540, after the passing arrangement had been agreed to by the two vessels, Appellant relieved Operator Pritchett on the M/V

BILL FROREICH. Operator Pritchett advised Appellant of the passing agreement with the M/V JANET DICHARRY to which Appellant replied, "Okay, I got you."

Shortly after Appellant assumed the watch, he began to maneuver the M/V BILL FROREICH's tow to port toward the north bank of the waterway. Operator Guidry on the M/V JANET DICHARRY contacted Appellant concerning his maneuver and advised him that a one whistle port to port passing arrangement had been agreed to by the vessels. Appellant replied that he misunderstood Operator Pritchett and that Appellant anticipated a two whistle meeting situation rather than the agreed upon one whistle passage.

Both operators put their engines in reverse, but were unable to avoid a collision in the vicinity of mile marker 179 on the Gulf Intracoastal Waterway.

BASES OF APPEAL

Appellant raises the following issues on appeal:

- 1) Failure to grant Appellant's motion to dismiss on the grounds the charge and specification had not been proved was clearly erroneous.
- 2) The Administrative Law Judge's conclusion that the charge and specification were proved by reliable, substantial, and probative evidence was clearly erroneous.

Appearance: By Donald L. King, Esq.

JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRÉ
Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170

OPINION

I

Upon review of the record in this matter, Appellant's arguments are persuasive that the Administrative Law Judge's conclusion that the charge and specification had been found proved is clearly erroneous. The Investigating Officer failed to prove that Appellant negligently failed to arrange a proper meeting situation. Appellant's motion to dismiss brought at the end of the Coast Guard's case should have been

granted by the Administrative Law Judge.

The evidence admitted at the hearing establishes that a proper port to port meeting situation had been arranged by the operators of the two vessels involved. Appellant relieved the watch as operator, acknowledged the passing agreement, and then failed to carry out that agreement, having misunderstood the agreement as told to him by Operator Pritchett.

Both Operator Pritchett, on board the M/V BILL FROREICH, and Operator Guidry, on board the M/V JANET DICHARRY, testified that, at approximately 0510 on 5 October 1987, they agreed to a one whistle, port to port, passing arrangement between the two vessels. (Transcript at pp. 26, 43, 45). At approximately 0540, Appellant relieved Operator Pritchett on board the M/V BILL FROREICH. (Transcript at pp. 27-28). At the time of relief, the M/V BILL FROREICH and its tow were located between mile marker 179 and 180 proceeding in an easterly direction along the southern bank of the waterway and less than half a mile from the approaching M/V JANET DICHARRY. (Transcript at pp. 26, 28-29, 34, 47). Appellant did not change the passing arrangement previously agreed to by Operators Pritchett and Guidry. However, Operator Pritchett testified that he overheard Appellant state, in a radio conversation with Operator Guidry on the M/V JANET DICHARRY, that he thought Operator Pritchett had arranged a two whistle, starboard to starboard, meeting situation. (Transcript at pp. 29-32). At that time, Appellant was steering the M/V BILL FROREICH toward the north bank of the waterway. (Transcript at pp. 35, 49). Operator Guidry, later, corroborated this evidence in his testimony. (Transcript at pp. 49-51). Appellant told Operator Guidry, on the radio, that he had misunderstood the passing situation as a two whistle arrangement instead of the one whistle arrangement previously agreed upon by Guidry and Pritchett. (Transcript at pp. 50-51).

Appellant was not charged with failing to carry out the passing agreement arranged by Operators Pritchett and Guidry. He was only charged with negligently failing to arrange a proper meeting situation. The evidence overwhelmingly establishes that a proper passing agreement was in effect between the two vessels prior to the collision. The Administrative Law Judge made Findings of Fact that support this evidence. (Decision & Order at pp. 5-6).

The Investigating Officer moved to amend the specification prior to Appellant's answer being entered. Appellant's counsel objected on the grounds that the Investigating Officer was proposing a substantive change. The Administrative Law Judge stated that a substantive change

in a specification could not be accomplished by amendment, but would require a dismissal without prejudice to refile the new charge and specification. The Investigating Officer elected to withdraw his motion and proceed with the hearing on the original charge and specification. See 46 CFR 5.525. Cf. Appeal Decision 2407 (GONSALVES); Appeal Decision 2326 McDERMOTT.

The Administrative Law Judge erred in denying Appellant's motion to dismiss on the grounds that the charge and specification had not been proved. A motion to dismiss should be granted when the Investigating Officer fails to introduce any evidence in support of one or more required elements of the government's case. See Appeal Decision 2461 (KITTRELL); Appeal Decision 2321 (HARRIS); Appeal Decision 2294 (TITTONIS). Cf. Appeal Decision 2368 (MADJIWITA), *aff'd sub nom. Commandant v. Madjiwita*, NTSB Order No. EM-20 (1985).

In reviewing the record, I find that the Administrative Law Judge's ruling denying the motion is not supported by substantial evidence of a reliable and probative nature. The Administrative Law Judge states in his opinion that "[t]he evidence is unmistakably clear that a proper meeting situation had been arranged between Operators Pritchett and Guidry." (Decision & Order at pp. 7-8). The Administrative Law Judge concluded that the evidence established that Appellant misunderstood the arrangement when he relieved Operator Pritchett. (Decision & Order at p. 7). According to the Administrative Law Judge, when the Appellant maneuvered the M/V BILL FROREICH into the path of the M/V JANET DICHARRY, he negated the prior passing agreement by that action alone. (Decision & Order at p. 8).

However, there is no evidence to show that Appellant took any definitive actions to cancel or change the prior agreement. A misunderstanding resulting in a change of course in violation of the prior agreement does not negate the prior agreement. See *St. Philip Offshore Towing Co., Inc. v. Wisconsin Barge Lines, Inc. et al*, 466 F.Supp. 403 (E.D.La. 1979); *Harcon Barge Co. v. M/V J.B. Chauvin, et al*, 487 F.Supp. 187 (N.D.Miss. 1979); *National Steel Corporation v. Buckeye Steamship Company*, 492 F.2d 364 (6th Cir. 1974). A change of course by one operator, in conflict with a prior agreement, does not negate the prior agreement, in and of itself, because the remaining operator still has a duty to abide by the agreement. *Board of Commissioners of the Port of New Orleans v. M/V FARMSUM*, 574 F.2d 289 (5th Cir. 1978); *Slade Inc. v. Mississippi Valley Barge Co.*, 296 F.2d 188 (5th Cir. 1961). Such an operator would be placed in an awkward position of having to interpret the actions of the

oncoming vessel and balance his duty to stand on in compliance with the agreement with his duty to avoid collision in extremis situations. Cf. *Mac Towing Inc. v. American Commercial Lines, et al*, 670 F.2d 543 (5th Cir. 1982). The purpose of passing agreements is to seek a commitment from each operator to actions that will result in vessels passing each other safely. Each operator, in turn, relies on the agreement and has a duty to conform his actions accordingly. Board of Commissioners, *supra*. With no evidence to show that Appellant changed the prior agreement, and overwhelming evidence establishing that a proper passing agreement existed between the two vessels, Appellant's motion to dismiss should have been granted.

II

Based on a review of the record, and for the reasons set forth above, the ultimate finding and conclusions of law made by the Administrative Law Judge are not supported by substantial evidence of a reliable and probative nature in accordance with 46 CFR 5.63.

The specification alleges that Appellant negligently navigated the M/V BILL FROREICH by failing to arrange a proper meeting situation with the M/V JANET DICHARRY. Upon close analysis, a theory could be formulated that the term "arrange", in the context of navigating a vessel, is the physical maneuvering of the vessel to successfully carry out the passing agreement between the two vessels. Clearly, Appellant did not arrange his vessel with respect to the M/V JANET DICHARRY to conform to the port to port passing agreement. However, a close reading of the record reveals that both the Investigating Officer and the Administrative Law Judge did not intend to pursue the case on this theory. (Transcript at pp. 15-17; 36-37; 54-56; 78-80).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that the findings of proved by the Administrative Law Judge as to the negligence charge and the supporting specification are not credible and not supported by substantial evidence of a reliable and probative character.

ORDER

The decision and order of the Administrative Law Judge dated on 8 February 1988, at New Orleans, Louisiana, are VACATED, the findings are SET ASIDE, and the charge and specification are DISMISSED without prejudice to refile.

CLYDE T. LUSK
Vice Admiral U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 5th day of January 1989.

3. HEARING PROCEDURE

.10 Amended by Administrative Law Judge (pleadings)
substantial changes not allowed

.39.5 Dismissal

motion for, improperly denied where no evidence
presented on the elements of specification

12. ADMINISTRATIVE LAW JUDGES

.50 Findings

not upheld where not supported by
substantial evidence

13. APPEAL AND REVIEW

.10 Findings

not upheld where not supported by
substantial evidence

CITATIONS

Appeal Decisions Cited: 2461 (KITTRELL), 2321 (HARRIS),
2368 (MADJIWITA), 2407 (GONSALVES), 2326 (McDERMOTT).

NTSB Cases Cited: None

Federal Cases Cited: None.

Statutes Cited: None

Regulations Cited: 46 CFR 5.525, 46 CFR 5.63.

***** END OF DECISION NO. 2479 *****